BEFORE THE NATIONAL LABOR RELATIONS BOARD
UNITED STATES OF AMERICA

SUTTER HEALTH CENTRAL VALLEY REGION d/b/a SUTTER TRACY COMMUNITY HOSPITAL, Respondent and Employer, and CALIFORNIA NURSES ASSOCIATION/ NATIONAL NURSES UNITED, CNA/NNU, Charging Party and Union.	Case No.: 32-CA-098549

BRIEF SUBMITTED BY RESPONDENT SUTTER CENTRAL VALLEY HOSPITALS d/b/a/ SUTTER TRACY COMMUNITY HOSPITAL IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION AND SUMMARY OF ARGUMENT.

Respondent Sutter Central Valley Hospitals d/b/a Sutter Tracy Community Hospital[1] (the "Hospital") has filed Exceptions[2] to the Administrative Law Judge's Decision and Recommended Order (hereafter the "ALJD" or "Decision") because the Decision, if adopted by the Board, requires a reversal of annual changes to the Hospital's health and wellness benefits, even though those changes were made on the same schedule as past, pre-certification changes, and even though the Hospital gave the Charging Party timely notice and an opportunity to bargain over them. If affirmed, the Decision would effectively overturn two decades of precedent permitting employers, under appropriate circumstances, to maintain a past practice of making annual adjustments to benefits and wages.[3]

In any event, the ALJD is deeply flawed quite apart from its break with past case law. This is not surprising because the ALJD misapplies key legal doctrines while completely overlooking other arguments that were raised at the hearing and in the parties' briefing.

First, the ALJD finds that the Hospital's proposal was a *fait accompli* — an issue on which the General Counsel bore the burden of proof — but does so based on a misunderstanding of the law and an egregious distortion of the facts. Thus, the ALJD concludes that the employer's stated desire to maintain parity between its union and non-union benefits rendered

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[1] Respondent was improperly named in the Charge as "Sutter Health Central Valley Region d/b/a Sutter Tracy Community Hospital." During the hearing before the Administrative Law Judge, the parties stipulated that Respondent's correct name is "Sutter Central Valley Hospitals d/b/a Sutter Tracy Community Hospital" and to correct the case caption accordingly. Tr. 181:16-25. To the extent the ALJD does not correct the caption in this matter as stipulated by the parties, Respondent hereby moves the Board to correct the caption so that it accurately reflects Respondent's name, "Sutter Central Valley Hospitals d/b/a Sutter Tracy Community Hospital."

[2] The Hospital's Exceptions, and this supporting brief, are filed pursuant to an extension of time granted on April 9, 2014, by the Associate Executive Secretary.

[3] *E.g.*, *St. Mary's Hosp. of Blue Springs*, 346 NLRB 776 (2006) (citing *Stone Container Corp.*, 313 NLRB 336 (1993)).

the proposal a *fait accompli* — a conclusion contrary to Board precedent. The ALJD also finds a *fait accompli* because the Respondent exercised its Section 8(c) right to communicate its proposals to employees. However, the ALJD completely overlooks that the communications in question were published only *after* the Hospital made its proposals, and that the same communications ***specifically stated*** that the changes would be the subject of bargaining. The entirety of the ALJD is fraught with similar errors and misstatements of fact, and results in a Decision that lacks both factual credibility and legal support. The ALJD's fixation on the issue of *fait accompli* is particularly alarming given that the ALJD seizes on an argument to which even the General Counsel gave little attention, and which distracts from the key issue in this matter: whether the Hospital provided the Union with notice and a meaningful opportunity to bargain.

Second, and turning to the central issue that was in dispute, while the ALJD correctly acknowledges that no overall impasse was required for the Hospital to implement changes to the health benefits and wellness plan, the Decision fails to recognize that the Union had notice and a meaningful opportunity to bargain over the issue. Instead, the ALJD sidesteps the issue entirely with its flawed *fait accompli* finding. Had the ALJD grappled with the record evidence, though, the only logical finding for it to make was that the Hospital complied with its bargaining obligations before announcing the implementation of the changes in question.

Third, the ALJD ignores evidence that the Union's own bargaining tactics — tying agreement on the next year's health benefit changes to overall agreement on contract language — poisoned the parties' bargaining process. The ALJD correctly holds that an overall contract impasse was not required, but fails to reckon with the fact that the Union took just the opposite position during the parties' discussions, and that this position was used to justify the Union's

leisurely and partial responses to the Respondent's time-sensitive proposals. Whether innocent or intentional, the Union's refusal to budge from its legally erroneous position made meaningful bargaining next to impossible. Indeed, to the extent the Board concludes that an impasse was required on the issue of health benefits changes, but that one was not reached, implementation was nonetheless proper because it was the Union's conduct, not the Hospital's, that frustrated good-faith bargaining.

Accordingly, and for the reasons set forth in more detail below, the Hospital respectfully requests that the Board decline to adopt the ALJD and that it instead issue a new and different Decision and Order dismissing the complaint in its entirety. In the alternative, the Board should vacate the ALJD and remand the matter for a new decision consistent with applicable law and the record evidence.

II. MATERIAL FACTS THAT THE ALJD MISCHARACTERIZES, MISAPPLIES, OR OMITS.

Various facts favorable to the result reached below are recited in the ALJD. However, numerous other facts, summarized below, were not properly considered either because the ALJD omits or mischaracterizes them. We summarize the omitted and mischaracterized facts before turning to the appropriate legal analysis in Section III.

A. The ALJD Assumes In Error That The Hospital's Implementation Of The Wellness Program And Health Benefits Plan Was A *Fait Accompli*.

The ALJD mischaracterizes, misapplies, or omits the following facts related to the Hospital's willingness to bargain over its proposed changes to the health benefits and wellness plan:

- The ALJD improperly concludes that the Hospital's goal of moving all unit and non-unit employees to the same health care benefits and wellness plan is evidence that the

Hospital did not intend to bargain with the Union.[4] The goal of preserving uniform benefits for union and non-union employees has previously been described in Board case law as "reasonable."[5]

- The ALJD erroneously finds that the Union presented a *bona fide* counterproposal, suggesting that the Union made movement toward the Hospital's proposal, when it did not.[6] To the contrary, the record evidence clearly establishes that the Union's proposal completely disregarded all of the Hospital's stated concerns about cost increases to the health plans.[7] The ALJD ignores this evidence, however.[8]

- For example, the ALJD completely ignores the clear evidence that the Union's counterproposal would have forced the Hospital to absorb significant increases in the cost of offering a three-tiered plan (which the Hospital had offered in previous years).[9]

- The ALJD also omits evidence that the Union's proposal also totally rejected the Hospital's proposed changes to the wellness program.[10]

- Moreover, the ALJD does not address, or even acknowledge, that the Union's proposal would not have become effective until a new contract was in place, which would have

[4] ALJD at 8:17-24.

[5] *See Cal. Pac. Med. Ctr.*, 356 NLRB No. 159, slip op. at 7 (2011) (ALJ, affirmed by Board).

[6] ALJD at 6:20-24; 9:1-2.

[7] Tr. 227:20-25; 228:1-3; 229:3-4; 230:17-21; 231:13-21.

[8] ALJD at 6:20-14.

[9] Tr. 227:20-25; 228:1-3; 229:3-4; 230:17-21; 231:13-21.

[10] Tr. 122:9-10; 227:1-3; 145:8-10.

required the Hospital to maintain the status quo — at additional expense — until some undetermined time in the future.[11]

- Critically, the ALJD wholly ignores the fact that the cost of both the existing EPO Plus health plan and the PPO health plan were going to increase for the next calendar year.[12] Accordingly, it would not have been possible for the Hospital to offer the same coverage in 2013 that it offered in 2012 without someone paying more for it, be it the Hospital or the employees.[13] The ALJD both ignores this evidence and the fact that the Union's proposal did not address this critical issue.[14]

- The ALJD faults the Hospital for not asking question about the Union's counterproposal when it was presented on October 25th, and wrongly equates "asking questions" with giving the proposal due consideration and weight.[15] The record evidence (ignored by the ALJD) makes clear that the Hospital fully reviewed the Union's proposal during a lengthy caucus.[16] After considering the proposal, the Hospital's negotiator identified to the Union his many concerns with the proposal, in particular the fact that it required the Hospital to freeze its existing benefits until the Union would agree to a different plan.[17]

- The ALJD gives undue weight to the fact that the Hospital rejected the Union's October 25th counterproposal before giving the Union "the opportunity to consider or study the

[11] Tr. 138:19-23; 230:14-17; Jt. Exh. 12.
[12] Tr. 199:20-23.
[13] Tr. 200:23-25; 201:1-5.
[14] ALJD at 6:20-14.
[15] ALJD at 9:1-2.
[16] Tr. 229:11.
[17] Tr. Tr. 230:5; 232:15-23; 233:14-17.

newly presented plan cost information."[18] The ALJD omits from its findings of fact that, in reality, the Union failed to request that information until the morning of October 25th, and that the Hospital provided the information by that afternoon.[19] The ALJD further omits that the Union both requested this information and submitted its only counterproposal on the date of the last scheduled bargaining session, and only six days before the open enrollment period.[20] Importantly, the ALJD fails to include or rely on the ample evidence that the Union already had the information it needed in order to confer with its members and submit an informed counterproposal including, *inter alia*, a full summary of all the changes to the summary plan description.[21] In fact (though the ALJD ignores this evidence) the Hospital promptly responded in full to each of the Union's requests for information.[22]

- In addition, the ALJD excludes material evidence concerning the Union's purported willingness to bargain separately over the health care issue.[23] Specifically, the ALJD ignores the fact that the Union's willingness to negotiate healthcare separately was contingent on the Hospital making no changes to the existing plan until the parties could reach agreement.[24] Critically, the ALJD makes no mention and affords no weight to the contemporaneous bargaining notes from the October 25, 2012 session, which support the

[18] ALJD at 9:2-3.

[19] Tr. 62:24-25; 63:1-6; 105:8-9; 229:11-16; Jt. Exh. 6.

[20] Id.

[21] Tr. 55:17-56:7-10; 65:3-10; 229:16-20; 267:17-25; 268:1-22; Jt. Exh. 11.

[22] Id.; *see also* Tr. 130:18-25; 131:1-4; Er. Exh. 6.

[23] ALJD at 6:37-39.

[24] Tr. 233:18-25; 234:1-3.

fact that, "the union was proposing the union employees would stay frozen while the rest of the hospital moves forward []."[25]

- Indeed, although the ALJD does not consider this evidence, the Union's November 12, 2012 letter also proves that the Union was only willing to negotiate health benefits on a separate track if the Hospital would agree to freeze all current benefits in place until those negotiations reached a mutually acceptable outcome.[26] Specifically, the Union's negotiator wrote to the Hospital that, "CNA would agree to implementation for January 1, 2013, absent a complete agreement, if we can agree at the table on a health and wellness benefit for the contract term."[27]

- The ALJD also incorrectly asserts that the Hospital's position was to implement its proposed changes to the wellness program and health benefits plan "without the need for negotiations."[28] The ALJD improperly relies on Jt. Exh. 17 to support its position, without acknowledging or understanding that Jt. Exh. 17 is a November 14, 2012 *contract counterproposal* concerning time off and benefits that the Hospital made to the Union for inclusion in an initial contract. It is not a proposal or a statement of intent concerning the separate and discrete issue of the Hospital's annual past practice of making changes to the health benefits and wellness plan that preexisted the Union.[29] Indeed, there is no testimonial evidence as to the Hospital's beliefs or intentions with

[25] Er. Exh. 9(e).

[26] Tr. 138:25; 139:1-3; 233:18-25; 234:1-3; 244:24-25; 245:1-3; Jt. Exh. 16.

[27] Jt. Exh. 3.

[28] ALJD at 8:21-24, citing Jt. Exh. 17.

[29] Jt. Exh. 17.

respect to Jt. Exh. 17, let alone as to the ALJD's finding that the Hospital believed it could implement its health benefits and wellness proposal without bargaining with the Union.

- The ALJD ignores evidence that the Hospital delayed rolling out open enrollment materials in order to facilitate bargaining with the Union.[30]

- In addition the record evidence makes clear that the Hospital remained open and committed to bargaining benefits for an initial contract even after October 26, 2012, when it determined that it needed to implement its proposed changes pursuant to past practice.[31] In an October 26th letter to the Union, the Hospital affirmed its "commitment to bargaining benefits for an initial contract" even though it needed to proceed with its proposed adjustments for the 2013 health benefits and wellness plan.[32] The ALJD fails to consider this evidence.

B. The ALJD Mischaracterizes Evidence Concerning The Hospital's Knowledge And Involvement With Respect To The 2013 Rates For The Health Plans.

The ALJD mischaracterizes, misapplies, or omits the following facts related to the Hospital's knowledge of and role in setting the 2013 rates for the Sutter Select Health Plans:

- The ALJD omits evidence that the final recommendation for the 2013 premium rates for the health plans was not made until August 29, 2012.[33]

[30] Tr. 201:13-14.

[31] Tr. 67:8-13; Jt. Exh. 14.

[32] Jt. Exh. 14.

[33] Tr. 246:2-247:1; 248:19-21; 304:1-6.

- The ALJD omits the fact that the Respondent's leadership did not finalize the physician network for the 2013 plan offering until after the August 29, 2012 recommendation concerning premium rates for the health plans.[34]

- There is uncontroverted evidence that Respondent did not settle on the proposed changes to the 2013 premium rates and physician network until September 20, 2012, nor could it have — but this evidence is excluded from the ALJD.[35]

- The ALJD improperly fails to consider that the Hospital notified the Union of its proposed changes to the healthcare benefits on September 21, 2013, *one day after* it finalized its proposed changes. Moreover, the ALJD ignores the undisputed record evidence that it would not have been possible to propose healthcare changes to the Union any sooner than September 21st*;* otherwise, there would "have been a huge black hole in the proposal about what the health network was" because the physician network was not yet clear.[36]

- Instead, the ALJD improperly infers that "[r]espondent knew about the intended changes well in advance of its notification to the Union and was behind the scenes planning changes."[37] The ALJD further finds, without basis, that the Hospital "purposely delayed" informing the Union about the changes to the health benefits plan.[38]

[34] Tr. 198:7-11; 304:15-25; 305:109.
[35] Tr. 304:8-11; 304:15-25; 305:109.
[36] Tr. 305:10-16.
[37] ALJD at 8:27-28.
[38] ALJD at 8:30-32.

- In making this inference, the ALJD improperly conflates Sutter Select, Sutter Health, and the Hospital, treating them as if they are one entity with a single mind, which they are not.[39]

C. The ALJD Omits Critical Evidence That The Union Had Ample Notice And A Meaningful Opportunity To Bargain The Proposed Changes, But Squandered That Opportunity.

The ALJD mischaracterizes, misapplies, or omits the following facts concerning the fact that the Hospital provided the Union with both ample notice and a meaningful opportunity to bargain over the proposed changes to the health benefits and wellness plan, and the fact that the Union failed to take advantage of the opportunity to bargain:

- The ALJD omits evidence that, from September 19 and 21, 2012 (the dates the Union was notified of the proposed wellness program and health benefits changes, respectively) until November 1, 2012 (the open enrollment deadline), the parties had approximately six weeks, or 40 days, to bargain over the health benefits and wellness program — more than enough time to adequately bargain over the issues so long as the Union made judicious use of the time available to it.[40]

- The ALJD fails to include evidence that the Union declined to discuss the Hospital's proposed changes to the wellness plan during the September 19th session, despite the fact that the Union was aware of the Hospital's proposal at that time.[41]

[39] Tr. 191:19-21; 195:16-18, 22-23.

[40] 285:12-25.

[41] Tr. 76:25; 77:1-4.

- Although there is ample evidence that the Union had all of the information it needed to bargain over the proposed changes to the health benefits and wellness plan, the ALJD completely ignores these facts. For example, the Union's chief negotiator Michael Brannan testified that, as early as September 21, 2012, he understood the Hospital's proposed changes with respect to deductibles, payments to the plan, and the proposed employee contribution to the plan.[42]

- The record also shows that the Union failed to request, in writing or otherwise, information about how much the Hospital would contribute under its healthcare proposal — but the ALJD omits this evidence, as well.[43]

- The ALJD mischaracterizes the fact "that Respondent had in mind a November launch for the open enrollment which would require that the plan be in place and ready to go."[44] To the contrary, the record evidence is that — regardless of what the Hospital "had in mind" — open enrollment must be completed by late November every year.[45]

- The ALJD further omits evidence that the Union was aware of this strict timeline, and that it knew the Hospital wanted to bargain over its annual changes to health benefits and wellness plans by the end of October, in time for open enrollment.[46]

[42] Tr. 102:15-18, 20-24; 119:25; 120:1-2.
[43] Tr. 102:18-19; 103:15-25.
[44] ALJD at 8:28-30.
[45] Tr. 320:13-14.
[46] Tr. 78:10-16.

- The ALJD fails to consider the fact that the Union did not request any additional bargaining sessions to address the Hospital's proposed changes to the health benefits or wellness plan.[47]

- Moreover, the ALJD excludes evidence that, at no point during bargaining, did the Union request to table other matters under negotiation for an initial contract in order to focus exclusively on the annual changes to health and wellness benefits for 2013.[48]

- The ALJD does not acknowledge that the Union failed to request to extend and/or devote more time during any of the scheduled sessions to discuss health benefits and the wellness plan.[49]

- The ALJD ignores the testimony of the Union's negotiator that he believed the Union would be able to negotiate the wellness plan on the schedule it had already been following, even "if management needed this addressed on such an expedient timeline."[50] Similarly, the ALJD omits the Union negotiator's testimony that he understood the issue of bargaining the health benefits was time-sensitive.[51]

[47] Tr. 107:13-121; 108:13-19; 189:17-20;
[48] Tr. 109:7-13.
[49] Tr. 189:21-25; 190:1-5.
[50] Tr. 107:18:21.
[51] Tr. 84:9-12.

- Although the Union's negotiator testified that the Union did not bargain over the health benefits and wellness plan during the October 2, 2012 session, the ALJD ignores this evidence.[52]

- The record evidence shows that, on October 2, 2012, the Union circulated a flier to employees stating that the Hospital cannot make changes to employee benefits absent agreement from the Union — but the flier makes no mention that the Hospital had actually proposed changes to the health benefits plan.[53] The ALJD does not acknowledge this fact.

- The ALJD fails to consider that, during the October 10, 2012 session, the Union asked only "general questions" of the Sutter Select and CVR Wellness Plan representatives, and that the Union otherwise did not bargain with the Hospital about any aspects of the proposed changes to the health benefits or wellness plan.[54]

- The ALJD further omits evidence that the Union primarily spoke with the Sutter Select and CVR Wellness Plan representatives about *existing* features of the health and wellness plan, rather than the Hospital's proposed changes to them.[55]

- Although the Hospital responded to the Union's October 10, 2012 information request concerning the proposed CVR Wellness Program within 2 days, the ALJD ignores this fact.[56]

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[52] Tr. 50:23-25; 51:1-2; 116:16-23.

[53] Tr. 119:3-7, 11-17.

[54] Tr.52:13-18; 130:9-12.

[55] 212:11-14; 214:3-6.

- The ALJD acknowledges that the Union did not bargain over the health benefits and wellness plan issue during the October 19, 2012 session, but omits key evidence concerning the Union's failure to bargain.[57] For example, the ALJD fails to include evidence that, although the Union was aware of the rigid timeline and open enrollment deadline, it nonetheless declined to request additional bargaining sessions or that the Hospital delay open enrollment.[58]

- The ALJD also omits evidence that the Hospital invited the Union to bargain over the health benefits and wellness plan issue during the October 19, 2012 session, but the Union declined to do so.[59]

- In addition, the ALJD erroneously finds that the Union did not bargain over the health benefits and wellness plan issue during the October 19, 2012 session "because the Union was still soliciting input from its members [.]"[60] To the contrary, the evidence shows that the Union had not yet solicited in writing any input from its membership, and that it did not do so until after the October 19th session, a month after the Hospital made its proposals.[61]

- The ALJD also ignores evidence that the Union's October 19th flier to members misleadingly asserted that the Hospital had only "recently" provided the Union with

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[56] Tr. 130:18-25; 131:1-4; Er. Exh. 6.

[57] ALJD at 6:11-13.

[58] Tr. 65:7-8; 132:25; 133:1-3, 17-21; 134:1-2, 3-8.

[59] Tr. 216:4-12.

[60] ALJD at 6:11-13.

[61] Tr. 123:13-16; Er. Exh. 7.

information about proposed changes to the health benefits plan, even though the Hospital had actually provided the same information to the Union nearly a month (29 days) earlier.[62]

- In fact, even after the Hospital announced that it would need to go ahead and implement its proposal, the Union failed to make any new proposals concerning healthcare at the next bargaining session on November 7th, and did not engage in any further healthcare-related discussions during that session.[63] The ALJD excludes this evidence from its findings of fact.

D. The ALJD's Findings With Respect To The Hospital's Communications With Unit Employees Are Misleading And In Error.

The ALJD mischaracterizes, misapplies, or omits the following facts related to the Hospital's direct communications with unit employees about the proposed changes to the wellness and health benefits plans:

- The ALJD incorrectly finds that the Hospital communicated to unit employees before the Union had an opportunity to submit a counterproposal.[64] To the contrary, the overwhelming record evidence is that the Hospital delayed any communications with unit employees until after the Union had an opportunity to respond to the Hospital's proposal.[65]

[62] Tr. 123:8-21; Er. Exh. 7.

[63] Tr. 68:19-22.

[64] ALJD at 8:37-38.

[65] Jt. Exh. 7.

- Indeed, and absent from the ALJD, the Hospital did not communicate in writing with unit employees until October 5, 2012, after the parties had already engaged in numerous correspondences, attended a bargaining session, and the Union itself had circulated a flier to unit members asserting that the Hospital would not be able to change the plan absent agreement from the Union.[66]

- Importantly, the Hospital's October 5, 2012 direct communication to unit employees *did not* present its proposal as final, and instead clearly stated, "***we will finalize RN benefits for 2013 only after the CNA has been given a full opportunity to bargain over our proposals.***"[67] This is the same communication the ALJD erroneously relies on when inferring that the Hospital's "***summaries were final and Respondent had no intention of altering them.***"[68] The ALJD omits these facts entirely.

- The ALJD ignores evidence that the October 5th memorandum to employees merely clarifies that the Hospital is entitled to address the issue of benefits separately from overall contract negotiations in accordance with its preexisting annual practice.[69]

- The ALJD also incorrectly finds that the Union did not have an opportunity to provide input as to the Hospital's proposals prior to disseminating the October 5th memorandum

[66] Tr. 50:1-4; 117:3-5; 209:11-19; Er. Exh. 5.

[67] Jt. Exh. 8 (emphasis added).

[68] ALJD at 8:37-40 (emphasis added), citing Jt. Exh. 8.

[69] Jt. Exh. 8.

to unit employees.[70] To the contrary, the Union had ample opportunity to provide input; it just failed to take meaningful advantage of that opportunity.

- Specifically, the ALJD fails to find that, although the Union neglected to respond to the Hospital's September 21st letter about the proposed health plan changes, there is no record evidence the Union was unable to respond to the Hospital's proposal.[71]

- In addition, the Union did not raise the health care issue when the parties met for bargaining on October 2, 2012 but, again, there is no evidence the Union was unable to bargain over (or even discuss) the matter.[72] In fact, the Hospital's negotiator did raise the health care issue at that time, and offered to bring in representatives from the Sutter Select Health Plan and the CVR Wellness program to discuss the proposed changes at the next session.[73] Contrary to the ALJD's findings (or lack thereof), the record evidence shows that the Union *chose* not to discuss the wellness and health benefits plan at that time, and to instead wait until the following meeting.[74]

- The ALJD omits the fact that the Union, for its part, did not even request any information that it might have needed from the Hospital concerning the health benefits proposal during the October 2nd session — and, again, there is no evidence the Union's failure to request information was in any way related to its ability, rather than its choice.[75]

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[70] ALJD at 8:37-38, 40-41; 9:1.
[71] Tr. 49:10-14; 85:12-19.
[72] Tr. 50:23-25; 51:1-2; 116:16-23.
[73] Tr. 50:1-4; 117:2-5; 209:11-19.
[74] Tr. 50:23-25; 51:1-2; 116:16-23.
[75] Tr. 117:19-20.

E. The ALJD Fails To Reach The Issue Of Impasse, And Omits Critical Evidence With Respect To The Union's Bargaining Strategy.

The ALJD mischaracterizes, misapplies, or omits the following facts related to the Union's misguided bargaining strategy (which was premised on the erroneous assumption that overall impasse was required), as well as the fact that the parties did reach single-issue impasse as to the health benefits and wellness plan, despite the Union's efforts to frustrate the process:

- The ALJD committed reversible error in declining to reach the issue of whether the parties were required to reach single-issue impasse, and in failing to include evidence of impasse.[76]

- For example, the ALJD omits material evidence concerning the Union's September 20, 2012 letter to the Hospital.[77] Critically, the ALJD fails to infer based on the uncontroverted evidence that the Union erroneously believed the parties were required to reach overall impasse before the Hospital could implement any changes to its healthcare plan.[78]

- The ALJD also omits the Union negotiator's testimony that he believed the Hospital was obligated "to either come to an agreement or get to impasse in negotiations on any particular item" before implementing any changes to the bargaining unit's health benefits or wellness plan.[79]

[76] ALJD at 9:12-13.

[77] ALJD at 5:4-13.

[78] Jt. Exh. 6.

[79] Tr. 109:21-23; 110:4-9.

- The ALJD is similarly devoid of any mention of the October 25, 2012 flier disseminated by the Union to its members, in which the Union again stated that the Hospital could not implement its proposed changes and instead was "require[d] to freeze all terms and conditions of employment until agreement is reached in negotiations."[80]

- The ALJD further erred in failing to find the Union's erroneous belief with respect to reaching overall impasse dictated the Union's strategy throughout the course of bargaining.[81]

- In addition, the ALJD omits evidence that the parties had, in fact, reached impasse on the issue of the health benefits and wellness plan.[82] There is ample record evidence, for example, that the parties "were completely stuck on the issues" and that, at the conclusion of the October 25th session, they were no closer to reaching agreement on the health benefits and wellness plan than they had been when the Hospital first notified the Union of its proposed changes on September 19th and 21st.[83] This is true even after the parties had well over a month to bargain, had exchanged fliers and letters, and the Hospital had even been questioned about whether it was even legal to discuss changes to the 2013 benefits.[84]

[80] Tr. 105:15-25; 106:4-6; 152:16-14; 153:2-12; Er. Exh. 8.
[81] Jt. Exh. 6.
[82] ALJD at 9:12-13.
[83] Tr. 235:4-13.
[84] 235:6-11.

III. LEGAL ARGUMENT[85]

A. The Administrative Law Judge's Conclusion That The Hospital's Proposed Changes Were A *Fait Accompli* In Violation Of Sections 8(a)(1) And (5) Is In Error And Unsupported By Board Precedent.[86]

The Administrative Law Judge erroneously found that the Hospital violated Section 8(a)(1) and (5) of the Act by implementing its health care plan and wellness benefits unilaterally as a *fait accompli*, without providing the Union notice and a meaningful opportunity to bargain.[87] Although the ALJD correctly (albeit incompletely) states the legal standard pertaining to *fait accompli*, it nonetheless erred in applying this standard to the objective record evidence. In so doing, the ALJD issued a truncated and legally unsupportable Decision that failed to address the critical issues before it.

It is well-established that a *fait accompli* occurs when, after concluding that bargaining over a subject is mandatory, the employer provides the union with too little notice or presents its proposal to the union "under circumstances where it is clear that the employer had no intention of bargaining about the subject[.]"[88] As the Administrative Law Judge noted (but ignored in his application of the facts) a *fait accompli* occurs "where the decision has already been made *and implemented*."[89]

The party asserting a *fait accompli* bears the burden of proof.[90] The Board must apply objective evidence in determining whether an employer has presented a *fait accompli*: "a union representative's subjective impression of the employer's state of mind and the employer's use of

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[85] Provides argument and evidence in support of, *inter alia*, Exceptions No. 40, and 45-47.

[86] Provides argument and evidence in support of Exceptions No. 6-8, 38, and 40.

[87] ALJD at 9:6-10, 22-25.

[88] *Bell Atl. Corp.*, 336 NLRB 1076, 1086 (2001).

[89] ALJD at 8:11-15 (emphasis added) (internal citations omitted).

[90] *Richmond Times-Dispatch*, 345 NLRB 195, 199 (2005).

positive language in its notice announcing the changes have been determined by the Board to be insufficient evidence of a 'fait accompli.'"[91] Further, where an employer makes a proposal and offers to bargain, it is incumbent on the union to test the respondent's intent to bargain by engaging in negotiations.[92]

1. The Union Has Not Met Its Burden Of Showing That The Record Evidence Supports A Finding Of A *Fait Accompli,* Even Under The Board Precedent Relied Upon By The ALJD.[93]

Here, the Union did not meet its burden of proving that the facts of this case are analogous (or even remotely similar) to those cases in which a *fait accompli* actually exists. In particular, the Administrative Law Judge's reliance on *Brannan Sand and Gravel, Pontiac Osteopathic Hospital, S & I Transportation,* and *Castle Hill Health Care Center* is misplaced.[94] The facts of each of these cases are inapposite to the facts of the instant case. In fact, the there is no evidence showing that the Hospital's conduct in any way rises to the level of a *fait accompli* as set forth in these cases, while, to the contrary, there is ample record evidence that the Hospital's decision was not predetermined and that the Hospital at all times bargained in good faith with the Union over the proposed changes to the health benefits and wellness plan.

In *Brannan Sand and Gravel*, the Board determined that an employer's decision to implement changes to its healthcare plan pursuant to an annually occurring past practice was a *fait accompli*.[95] In that case, however, the Board found that a *fait accompli* occurred because the

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[91] *Bell Atl. Corp.*, 336 NLRB at 1086 (citing *Mercy Hosp.*, 311 NLRB 869, 873 (1993) and *Haddon Craftsmen, Inc.*, 300 NLRB 789 (1990)); *see also W-I Forest Prods. Co.*, 304 NLRB 957 (1991).

[92] *Richmond Times-Dispatch*, 345 NLRB at 199.

[93] Provides argument and evidence in support of Exceptions No. 27-37.

[94] ALJD at 8:13-15; 9:8-10.

[95] *Brannan Sand & Gravel Co.*, 314 NLRB 282, 282 (1994).

employer "announced" the changes to employees *prior* to even proposing them to the union.[96] Further, the employer's own witness testified during the hearing that discussing the proposed changes would have been "fruitless" because the employer did not intend to make any changes to its healthcare proposal prior to implementation.[97]

Pontiac Osteopathic Hospital proves to be even less relevant. There, the employer made the decision to create a uniform PTO policy for both union and non-union employees.[98] Thereafter, the employer notified the union in writing of its "intention […] to unilaterally implement several wage and benefit revisions."[99] The letter also announced the effective date of the predetermined changes.[100] Notably, the employer's letter neither expressed an intention to bargain over the changes, nor did it invite the union to participate in bargaining.[101] Although the union requested to bargain over the changes to the PTO plan, the employer ignored that request and instead posted bulletins stating, without qualification, that the new policy would be implemented.[102] The Board upheld the administrative law judge's decision that the employer's changes were a *fait accompli*, noting that the language of the employer's communications to the union made it clear that the decision was predetermined, and that the employer did not permit the union to bargain prior to implementing the changes.[103]

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[96] *Brannan Sand & Gravel*, 314 NLRB at 286.

[97] *Id.* at 282.

Notably, the Board expressly declined to rely on the administrative law judge's "direct dealing" analysis (set forth at 314 NLRB at 286-87), *see* 314 NLRB at 282 n. 1, yet the ALJD here appears to follow the same analysis discarded by the Board in *Brannan Sand & Gravel.*

[98] *Pontiac Osteopathic Hosp.*, 336 NLRB 1021 (2001).

[99] *Id*. at 1021.

[100] *Ibid*.

[101] *Ibid*.

[102] *Id*. at 1021-22.

[103] *Id*. at 1023.

S & I Transportation is similarly inapplicable.[104] In that case, the Board held that the employer presented its proposal to change the pay period from weekly to bi-weekly as a *fait accompli.*[105] The Board reasoned that the employer announced the unilateral action directly to employees, rather than to the union.[106] Indeed, the union only found out about the employer's intentions through the employees with whom the employer had already communicated.[107] Although the parties met once for bargaining, that meeting would not have taken place but for the union's threat to file an unfair labor practice charge.[108] Tellingly, the employer even testified that its position was fixed with respect to the pay period changes.[109]

In the matter at hand, however, the Union offered no evidence (and indeed there is none) that the Hospital's conduct could conceivably be considered a *fait accompli* under any prevailing Board authority, and the Administrative Law Judge erred to conclude otherwise. Unlike in the aforementioned cases, there is no evidence that the Hospital engaged in direct communications with employees in advance of its notice to the Union.[110] Nor did any of the Hospital's communications during bargaining (to either employees or to the Union) present the proposed changes as final and non-negotiable.[111] To the contrary, the Hospital affirmed that it ***would not***

[104] *S&I Transp.*, 311 NLRB 1388 (1993).
[105] *Id*. at 1388 n.1.
[106] *Ibid.*
[107] *Ibid.*
[108] *Ibid.*
[109] *Ibid.*
[110] Tr. 39:2-10; 45:4-8; 75:15-18; 122:17-18; 124:1-3; Jt. Exhs. 5, 7 and 8.
[111] Jt. Exhs. 5, 7 and 8.

implement any changes to employee benefits before the Union had an opportunity to bargain, nor did it.[112]

Indeed, the Hospital explicitly invited the Union to bargain over the changes.[113] The Union asserted its right to bargain and participated in four bargaining sessions over a period of approximately six weeks, during which the Hospital repeatedly raised the issue and requested that the Union submit a counterproposal.[114] The Hospital also invited questions from the Union (and even suggested that representatives from the Sutter Select and CVR Wellness Program attend a bargaining session to provide the Union with any information it might need to bargain).[115] The Hospital responded promptly to each of the Union's requests for information, sometimes with turnaround as short as one day.[116] Further, unlike the cases cited in the ALJD, there is no evidence that the Hospital communicated to the Union, or even believed, that bargaining would be fruitless or that its proposal was immutable.[117] Only after the Union submitted its wholly inadequate counterproposal on October 25th did the Hospital realize that the

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[112] Jt. Exh. 8.

[113] Jt. Exhs. 5 and 7.

[114] Tr. 50:1-4; 53:9-11; 57:16-19; 117:3-5; 122:21-123:1; 130:18-19; 132:25; 133:1-3; 137:8-13; 209:11-19; 214:11-17; Jt. Exhs. 6 and 12.

Indeed, the ALJD finds that "the Union did not waive its right to bargain and in fact took active steps to exercise its right." (ALJD at 7:n. 3). The Administrative Law Judge's recognition of the fact that the Union did, in fact, engage in some bargaining (notwithstanding the fact that it squandered much of the opportunity available to it) undermines his finding that the Hospital's proposal was a *fait accompli*. The Board has held that a union is excused from bargaining when the employer presents a *fait accompli*, in other words, proof of a *fait accompli* serves as a defense to a Union that fails to assert its right to and/or engage in bargaining. *See, e.g., Brannan Sand & Gravel*, 314 NLRB at 286 (citing *Gulf State Mfg. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983)). It is logically inconsistent to find that the Union both did and was precluded from bargaining, and the Administrative Law Judge's misapplication of the law in this respect must be reversed.

[115] Tr. 50:1-4; 117:3-5; 209:11-19.

[116] Tr. 55:17-25; 56:7-10; 65:3-10; 130:18-131:4; 229:16-20; 267:17-25; 268:1-22; Jt. Exh. 11; Er. Exh. 6.

[117] *See, e.g.*, Jt. Exh. 5, 7 and 8.

parties were too far apart on the issue to reach agreement prior to the open enrollment deadline, and subsequently take steps to implement its proposal.[118] Accordingly, the totality of evidence clearly shows that the Hospital did not present its proposal as a *fait accompli*, and the Administrative Law Judge's conclusion to the contrary must be reversed.[119]

2. The Hospital Did Not Present A *Fait Accompli* By Waiting To Propose Health Benefits Changes Until September.[120]

The Administrative Law Judge further erred in concluding that the Hospital's proposal was a *fait accompli* because the Hospital "purposefully delayed" notifying the Union of its proposed changes to the health benefits and wellness plan until its proposal had been finalized.[121] To the contrary, there is no requirement that an employer notify a union of potential changes to healthcare as soon as the changes become a mere possibility, and in fact there is ample Board precedent to support the fact that the Hospital appropriately waited to make its proposal until September 2012. Indeed, the timeframe during which the Hospital determined changes to the health and wellness plans would be appropriate was perfectly consistent with the Hospital's past practice.

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[118] Tr. 67:8-13; 134:3-5; 230:4-5; 232:5-23; 233:14-17; 235:22-236:7; 271:9-11; 272:2-10; Jt. Exh. 14.

[119] The Administrative Law Judge also relies on *Castle Hill Health Care Center* to establish the prevailing standard for a *fait accompli*. (ALJD at 8:9-15). That case does not support a finding of a *fait accompli*, and in fact the Board in that case does not address the issue with respect to the facts before it. There, the Board was faced with deciding whether an employer unlawfully implemented its final offer with respect to, *inter alia*, employee wages, a two-tier no frills system that changed the rate of compensation for certain employees, elimination of overtime pay, and health insurance changes. (*Castle Hill Health Care Ctr.*, 355 NLRB No. 196, slip op. at 35 (2010)). In *Castle Hill*, the Board did not reach the issue of whether the employer's proposals with respect to these issues were a *fait accompli*. (*Id*. at 34-35). Rather, the Board held that the parties had not reached overall impasse on the contract, and therefore the employer's unilateral implementation of its proposals related to wages, hours, and other terms and conditions of employment was impermissible. (*Id*. at 35). As such, to the extent the ALJD relies on *Castle Hill* to support its finding of a *fait accompli*, it did so in error and must be reversed.

[120] Provides argument and evidence in support of Exceptions No. 10-16.

[121] ALJD at 8:26-34.

In *Bell Atlantic Corp.*, for example, the Board declined to find that the employer's decision to close and permanently transfer bargaining unit work out-of-state was presented to the union as a *fait accompli*, even though the employer had been considering at least some aspects of the closure and relocation as early as February 1998.[122] Although the parties engaged in formal contract negotiations from February through August 11th, the employer declined to notify the union of its plans until seven months later, on August 24, 1998.[123] The Board reasoned that up until August the employer's plans were just a "concept" and that the decision memorialized in the August proposal to the union was not identical to the plan under consideration in February.[124] Relying on *Haddon Craftsmen, Inc.*[125] and *Lange Co.*,[126] the Board reasoned that, based on established precedent,

> …it is not unlawful for an employer to present a proposed change in employees' terms and conditions of employment as a fully developed plan. Board law requires only that, after reaching a decision concerning a mandatory subject, that the employer delay implementation of the decision until it has consulted with the employees' bargaining representatives. The Act does not require the employer to delay the decision-making process itself.[127]

Because the employer notified the union "as soon as a final decision was made" with respect to its proposal, it did not violate the Act by presenting a *fait accompli*.[128]

Similarly, the record evidence (omitted in the ALJD) is clear that, during contract negotiations in June 2012, the Hospital did not make any specific proposal with respect to

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[122] *Bell Atl. Corp.*, 336 NLRB at 1088.

[123] *Id.*

[124] *Id*. at 1089.

[125] 300 NLRB 789, 790 n.8 (1990).

[126] 222 NLRB 558, 563 (1976).

[127] *Bell Atl. Corp.*, 336 NLRB at 1088.

[128] *Ibid.*

changes to the health benefits and wellness program *because it had not decided on any changes to these plans*.[129] Indeed, the evidence shows that the Hospital did not have the requisite information to make an informed and complete proposal to the Union until mid-September, when it did.[130] Prior to September 20th, the Hospital did not know what the premium rate for the health plans would be, nor did it know what the physician network would be.[131] Once this information became clear to the Hospital, it immediately finalized its proposal and submitted it to the Union.[132] Like the employer in *Bell Atlantic Corp.*, the Hospital permissibly waited to make its proposal to the Union until it had information sufficient to ensure the proposal would actually be meaningful. This is not evidence of a *fait accompli*, as the ALJD claims, but rather evidence that the Hospital bargained responsibly and fairly, notifying the Union of its proposed changes as soon as it had a "fully developed plan" and not just a mere conversation piece. In sum, the Administrative Law Judge's reasoning and application of the facts with respect to the timing of the Hospital's proposal was flawed, and the ALJD must be reversed.

3. The ALJD Entirely Distorts The Hospital's Communications To Employees About The Health And Wellness Benefits.[133]

The ALJD's conclusion that the Hospital intended its proposal as a *fait accompli* because it engaged in direct communication with represented employees about the summaries of its proposed changes is similarly faulty and unsupported by previous Board decisions. To the contrary, established Board precedent makes clear that the Hospital's October 5, 2012 communication with employees was not only permissible, it was in no way indicative of a *fait*

[129] Tr. 39:2-10.

[130] Tr. 304:8-11; 305:10-16, 24-25; 306:1.

[131] Tr. 198:7-11; 246:2-225; 247:1; 248:19-21; 304:1-6, 8-11, 15-305:9, 24-25; 306:1.

[132] Tr. 198:1-3; 304:8-1; 305:24-25; 306:1.

[133] Provides argument and evidence in support of Exceptions No. 9, 17-18, and 20-22.

accompli. In *Richmond Times Dispatch*, for example, the employer's direct communication to unit employees concerning its decision to cancel a holiday bonus was not evidence of a *fait accompli*, where the defendant notified the union in advance of the change and acknowledged that the changes were bargainable.[134] Similarly, in *McGraw-Hill Broadcasting Co.*, the employer's direct communication with employees concerning its decision to lay off certain part-time employees was not evidence of a *fait accompli* where the employer simultaneously notified both the union and the affected employees because the union had sufficient actual notice of the impending changes to bargain.[135]

Here, contrary to the ALJD, the Hospital's October 5, 2012 memorandum to unit employees cannot be found as evidence of a *fait accompli*. As a preliminary matter, the Hospital sent the memorandum over two weeks *after* it had already directly notified the Union of its proposed changes to both the wellness plan and the health benefits on September 19th and 21st, respectively.[136] During the intervening two weeks, the Union had ample opportunity to read, understand, and respond to the Hospital's proposed changes and, in fact, the parties did communicate about the proposed changes both via written correspondence and during a bargaining session.[137] This, on its own, is sufficient under *Richmond Times Dispatch* and *McGraw-Hill Broadcasting* to show that the Hospital's subsequent memorandum to employees did not circumvent or in any way inhibit the Union's opportunity to bargain.

More important, however, the purpose of the Hospital's memorandum was obviously not to notify employees that the changes were set in stone (which they were not) but instead to

[134] *Richmond Times Dispatch*, 345 NLRB 195, 199 (2005).

[135] *McGraw-Hill Broad. Co.*, 355 NLRB No. 213, slip op. at 2 (2010).

[136] Tr. 12:17-18; 124:1-3; Jt. Exh. 8.

[137] Tr. 50:1-4; 102:15-18, 20:24; 117:3-5; 119:25; 120:1-2; 209:11-19; Jt. Exh. 6.

clarify the Union's misleading statement to its members that, "[b]y law Sutter Tracy must continue to offer all benefits without change until we have reached agreement for any changes. Therefore, failing an agreement by the time open enrollment begins, the 2012 wellness program must be continued as it is today."[138] (To be sure, although the Union was well aware of the Hospital's proposed changes to the health benefits, its October 2nd communication to members entirely omitted this information.)[139] The Hospital's October 5th memorandum clarified that, "[c]ontrary to the information provided by the Union, a contract does not need to be in place in order for the [health benefits and wellness program] changes to be implemented. […] Since no Union contract has ever been in place, [the Hospital] is legally permitted to address benefits for next year on a separate track from our overall contract negotiations."[140] Notably — and totally overlooked by the ALJD — the memorandum expressly stated, "[W]e will finalize RN benefits for 2013 ***only after the CNA has been given a full opportunity to bargain over our proposals.***"[141] Thus, the memorandum in no way claimed the Hospital's proposed changes were final, and in fact expressed the exact opposite: that the health benefits and wellness plan would not be finalized before the Union had an opportunity to bargain. And, as discussed in more detail below, the Hospital lived up to its promise. Accordingly, the ALJD's inference that the October 5, 2012 memorandum was evidence of a *fait accompli* stands in total contradiction to the record evidence.

[138] Er. Exh. 5.

[139] Tr. 119:3-7, 11-17; Er. Exh. 5.

[140] Jt. Exh. 8.

[141] Id. (emphasis added).

4. The Hospital Was Not Legally Obligated To Offer Substantive Concessions To Its Original Proposal, Nor Was Its Candid Announcement Of Its Goals Evidence Of A *Fait Accompli.*[142]

The ALJD's reliance on the fact that the Hospital did not make subsequent concessions to its initial proposal as evidence of a *fait accompli* is flawed, and is a reversible error of law. The Board has repeatedly held that there is no requirement that an employer bargain against itself in the face of a union's refusal to budge on an issue, as is the case here. Rather, Board precedent clearly permits employers to engage in hard bargaining, and to do so is not evidence of a *fait accompli*. Indeed, "[t]he duty to bargain does not preclude a party from making its best offer first, or require 'auction' bargaining."[143] Nor is an employer's clear and candid position to offer the same benefits for union and non-union employees evidence of a *fait accompli*.[144] Further, the Board has routinely held that a union's flexibility in reaching agreement cannot be conditioned on movement by the employer.[145]

Two cases in particular illustrate the gravity of the Administrative Law Judge's error in concluding that the Hospital's bargaining position was evidence of a *fait accompli*. In *California Pacific Medical Center,* a case with facts much like those here, the Board found that the employer was privileged to implement its proposed changes to its health benefits, despite the union's repeated assertions that it was flexible and open to compromise.[146] In that case, the employer "advanced its candid, consistent, and reasonable position throughout negotiations that all employees, regardless of union representation, be subject to a wage freeze and be enrolled in

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[142] Provides argument and evidence in support of Exception Nos. 9 and 38.

[143] *Indus. Elec. Reels, Inc.*, 310 NLRB 1069, 1072 (1993) (totality of employer's conduct did not warrant finding of bad faith bargaining with respect to economic proposals) (citing *Long Island Jeep*, 231 NLRB 1361, 1367 (1977)).

[144] *See Cal. Pac. Med. Ctr.*, 356 NLRB No. 159, slip op. at 7 (May 25, 2011).

[145] *Id*. at 7.

[146] *Ibid.*

their choice of the SutterSelect healthcare plans."[147] The union, however, made a regressive healthcare proposal that added impractical options, gave employees the benefit of a more expensive PPO plan with no additional cost, and refused to move away from then three-year old copays and coinsurance.[148] The Board further observed that, "the Union's purported continued flexibility was dependent upon a condition precedent, namely, a demonstration of flexibility by Respondent."[149] Because the employer had made its last, best, and final offer, and had rejected the union's regressive proposal, the Board found that the parties were at impasse and that the employer permissibly implemented its proposal.[150] But, somehow, the position described as "candid, consistent, and reasonable" in a case decided just three years ago is transformed into an unlawful "fait accompli" in the ALJD here.

Similarly, in *Alcoa, Inc.*, the Board reversed an administrative law judge's decision that an employer refused to bargain because it did not offer concessions to the union after it requested the union change the way it held meetings so as to not interfere with working hours.[151] The Board reversed the ALJD, holding,

> [c]ontrary to the judge, the Respondent had no duty to initially offer substantive concessions; its duty was merely to give the Union adequate notice and an opportunity to bargain, a duty we find it met. The Respondent informed the Union of its problem, promptly complied with the Union's request to present supporting documentation of lost man hours, and sought, three times, 'a proposal or alternative to' shutting down [the employer's] equipment. Despite this, the Union offered nothing. That an end to the unpaid leave practice was imminent was clear from the totality of [the employer's] communications to the union […]

[147] *Cal. Pac. Med. Ctr.*, supra, 356 NLRB No. 159 at 7.

[148] *Id.* at 4.

[149] *Id.* at 7.

[150] *Ibid.*

[151] *Alcoa, Inc.*, 352 NLRB 1222, 1224 (2008).

> Under these circumstances, we find that the Respondent met its duty to put the Union on notice of the impending change to its leave policy and to give the Union an opportunity to bargain.[152]

As both of these cases show, the Administrative Law Judge's conclusions with respect to the Hospital's bargaining position are deeply flawed. First, as made clear by *California Pacific Medical Center*, the Hospital's stated goal of having both union and non-union employees have the same benefits is reasonable, and cannot be evidence of a *fait accompli*. The Administrative Law Judge's position that the Hospital was not permitted to state a goal early on and bargain consistent with reaching that goal is, simply put, wrong.

Second, the ALJD cries *fait accompli* while totally overlooking the fact that the Union's position throughout bargaining was entirely intransigent.[153] Indeed, when the Union finally submitted its counterproposal, mere days before the open enrollment period, it made no movement whatsoever on the wellness program, and made unreasonable demands regarding the health benefits, *.i.e.*, to freeze them until the parties could agree on an overall contract.[154] The record evidence, omitted by the Administrative Law Judge, is that the Union's counterproposal was not only inflexible, it was in many respects regressive — maintaining the status quo, as the Union demanded, was impossible because, no matter what, rates were going to increase and those additional costs would have to be absorbed by someone.[155] Like the employer in *Alcoa*, the Hospital put the Union on notice of a problem, and even submitted a proposal to address the problem. Thereafter, it was the Union's obligation to offer forward movement, which it did not

[152] *Alcoa, Inc.*, supra, 352 NLRB 1222 at 1224.

[153] ALJD at 9:1-2.

[154] Tr. 233:18-25; 234:1-3; 244:24-25; 245:1-3

[155] Tr. 200:23-25; 201:1-5.

do. In the face of the Union's total inflexibility, the Hospital was not then obligated to move to the middle alone, as the ALJD suggests.

B. The ALJD Erroneously Failed To Reach The Issue Of Whether The Hospital Provided Notice And A Meaningful Opportunity To Bargain About Its Proposed Changes To The Health And Wellness Benefits.

1. Six Weeks Is Well-Established To Exceed The Threshold Obligation For Notice And Reasonable Opportunity to Bargain.[156]

The ALJD unduly focuses on the issue of *fait accompli*, and as a consequence does not meaningfully address the heart of the issue presented for decision: whether the Hospital provided the Union with notice and a meaningful opportunity to bargain over the health benefits and wellness plan. The record evidence is clear that the Hospital did meet its legal obligation to the Union. The ALJD erred both in its failure to include this salient evidence and in the conclusion it ultimately reached.

As the Hospital made clear in its post-hearing brief, to meet its burden of providing notice and a meaningful opportunity to bargain, an employer need only "inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counterarguments or proposals."[157] "To be timely, the notice must be given sufficiently in advance of [the] actual implementation of the change to allow a reasonable opportunity to bargain."[158]

In its post-hearing brief, the Hospital relied on three on-point cases, each of which illustrate that the Hospital provided the Union with ample notice and a meaningful opportunity to

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[156] Provides argument and evidence in support of Exceptions No. 2 and 5.

[157] *Pontiac Osteopathic Hosp.*, 336 NLRB 1021, 1023 (2001) (internal quotations omitted).

[158] *Ciba-Geigy Pharm. Div.*, 264 NLRB 1013, 1017 (1982), *enf'd*, 772 F.2d 1120 (3d Cir. 1983) (citation omitted).

bargain. The ALJD simply ignores these cases. In *St. Mary's Hosp. of Blue Springs*,[159] *Nabors Alaska Drilling, Inc.*,[160] and *Saint-Gobain Abrasives, Inc.*,[161] the employers annually reviewed and adjusted their healthcare plans and instituted any plan design changes to be effective January 1st, with an open enrollment period (including distributing information to employees) between October and December. The employer, in each of these cases, notified the union of proposed changes to the healthcare plan that the employer wished to implement, providing the union with an opportunity to bargain over these changes. In *Nabors*, the employer notified the union on November 21st; in *St. Mary's*, on November 4th. In each case, the employer clearly notified the union that time was of the essence because of the deadline for making these proposed changes.

In *Saint-Gobain*, the parties began bargaining on May 20th, and learned of the need to deal with an insurance-carrier's change of health plans in late August. The employer repeatedly informed the union that "time was of the essence," because the proposed changes would need to be in place by January 1st. The union, however, delayed discussion of the employer's time-sensitive proposal and refused to acknowledge the firmness of the impending open enrollment and January 1st deadlines. There, the union argued that the employer could maintain the existing health plans if it wanted to, further refusing to acknowledge the time-sensitivity of the proposals.[162] The Board affirmed the administrative law judge's finding that bargaining could not have continued into the open enrollment period and that the union must have known the employer's proposals were time-sensitive.[163]

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[159] 346 NLRB 776 (2006).

[160] 341 NLRB 610 (2004).

[161] 343 NLRB 542 (2004).

[162] *Saint-Gobain*, supra, 343 NLRB 542 at 550.

[163] *Ibid.*

Indeed, numerous other Board decisions make clear that an employer can meet its obligation with anywhere from four days' to three weeks' notice. For example, in *Knight Protective Services, Inc.*, the Board dismissed an unfair labor practices charge, finding that ten days' notice was sufficient for the employer to bargain over implementation of new lunch break procedures.[164] Similarly, in *Jim Walter Resources*, the Board held that the employer did not engage in an unfair labor practice when, during a strike, it unilaterally ceased to pay medical premiums for employees receiving disability payments.[165] The Board found that the ten days' notice provided by the employer was adequate and even that, "[t]he Board has on occasion found as little as 2 days' notice adequate; it has frequently found notice ranging from 4 to 8 days sufficient."[166] In *Bell Atlantic Corp.*, the Board held that the employer provided notice and meaningful opportunity to bargain where it gave the union two weeks' notice before the deadline to implement its proposed facility closure and relocation.[167] Likewise, in *McGraw-Hill Broadcasting Co.*, the Board found that the employer did not unlawfully refuse to bargain with the union over its decision to lay off three part time employees. [168] Rather, the employer issued its layoff notice three weeks prior to the implementation date, which "was an adequate period for the parties to negotiate over the layoff decision."[169]

Although the Union cannot seriously claim that it failed to receive notice of the Hospital's proposals and was unable to meaningfully bargain over them, the ALJD fails even to

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[164] 354 NLRB 783, 791 (2009).

[165] 289 NLRB 1441 (1998).

[166] *Id.* at 1442 (citing *Cherokee Culvert Co.*, 266 NLRB 290 (1983); *Clarkwood Corp.*, 233 NLRB 1172 (1977); and *Medicenter, Mid-South Hosp.*, 221 NLRB 670 (1975)).

[167] 336 NLRB 1076, 1088 (2001).

[168] 355 NLRB No. 213, slip op. at 1-2 (2010).

[169] *McGraw-Hill Broadcasting Co.*, supra 355 NLRB No. 213 at 2.

acknowledge this issue. The Union had approximately six weeks, or 40 days, to bargain over these time-sensitive changes — comparable to the one month and one week acceptable in *Nabors* and the two months acceptable in *St. Mary's*.[170] Six weeks, in addition to the Hospital's repeated and emphatic reminders to the Union that its proposals were time-sensitive, clearly satisfies the Hospital's obligation to provide notice. To be sure, the Union's own witness freely admitted that he and the Union understood that the Hospital's proposals were time-sensitive and that they were working under a rigid timeline due to open enrollment.[171] Indeed, during that time, the parties engaged in four regularly-scheduled bargaining sessions, more than enough time to bargain meaningfully over the proposed changes.[172] The ALJD's total circumvention of this well-established body of case law (and its clear application to the record evidence) renders the ALJD flawed and, by necessity, reversible.

2. The ALJD Erred In Refusing To Find The Union Squandered Its Opportunity To Bargain.[173]

The ALJD further errs when it concludes that a finding with respect to the Union's bargaining misconduct was mooted by the Hospital's purported submission of a *fait accompli*.[174] To the contrary, the record evidence (wholly ignored by the ALJD) makes clear that the Union squandered its opportunity to bargain over the Hospital's proposed changes to the health benefits and wellness program.

In its post-hearing brief, for example, the Hospital made clear that it provided the Union with clear, written explanations of its proposed changes and promptly provided the Union with

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[170] *See Nabors*, 341 NLRB 610 at 611; *St. Mary's*, 346 NLRB 776 at 776.

[171] Tr. 65:7-8; 123:4-10; 133:17-21.

[172] Tr. 50:1-4; 51:7-14; 53:9-11; 57:16-19.

[173] Provides argument and evidence in support of Exceptions No. 4, 15, 19, and 24-26.

[174] ALJD at 8, n. 6.

any and all information it requested.[175] The Union, however, failed to ever notify the Hospital in writing that it wished to bargain over health benefits, despite the Hospital's September 21st written request that it do so.[176] Despite its ground rule with the Hospital to submit requests for information in writing, from the time it first received notice of the Hospital's proposed changes until open enrollment, the Union only made one written information request, and requested very little information verbally.[177] At times, the Union's negotiator did not even read the information available to him.[178] And, it was the Hospital's representative, not the Union, who suggested that the Hospital provide Sutter Select and CVR Wellness Program representatives to answer any questions the Union may have had about the Hospital's proposals to the health benefits and wellness plan.[179] The Union, for its part, spent much of this session discussing existing practices unaffected by the proposed changes and other irrelevant matters.[180] During the four scheduled bargaining sessions, the Hospital's representative reminded the Union that the parties needed to negotiate the health benefits and wellness issues.[181] Yet the Union did not use any of these scheduled sessions to actually bargain, and instead focused on other matters.[182] The Union also failed to offer any written counterproposal to the Hospital until October 25th, a mere six days

[175] Tr. 90:11-19; 91:13-92:3; 93:17-24; 130:18-25; 131:1-4; Jt. Exh. 5 and 7.
[176] Tr. 49:10-14; 85:12-19; Jt. Exh. 7.
[177] Tr. 102:18-19; 103:15-25; 229:11-16.
[178] Tr. 95:17-23.
[179] Tr. 50:1-4; 51:7-14; 117:3-5; 209:11-19.
[180] Tr. 212:11-14; 214:3-6.
[181] Tr. 122:21-25; 123:1; 133:4-11; 132:25; 133:1-3; 214:11-17.
[182] Tr. 50:23-51:2; 16:16-23; 30:9-2.

before the open enrollment deadline.[183] Clearly, the Union had plenty of opportunity to bargain over the Hospital's time-sensitive proposed changes; it just wasted the time it had.

Disregarding the record evidence, however, the Administrative Law Judge ignores the fact that the Union's conduct was dilatory, and instead improperly mischaracterizes the record to conclude the Hospital engaged in a *fait accompli*. The ALJD's failure to recognize that the Union's own conduct precluded the parties from engaging in meaningful bargaining is, again, reversible error.

C. The ALJD Wrongly Required The Hospital To Prove The Time-Sensitive Nature Of The November Open Enrollment Period Was Caused By External Factors.[184]

To the extent the ALJD required the Hospital to prove that its past practice of holding open enrollment in November was not self-imposed, it did so in error. The ALJD states: "Respondent failed to demonstrate that the exigency was caused by external events, was beyond the employer's control, and/or was not reasonably foreseeable."[185] To be sure, the Hospital provided ample evidence that bargaining was time-sensitive due to the open enrollment deadline, as well as evidence that the deadline was real and not self-imposed. But, the ALJD erred as a matter of law to the extent it required the Hospital to meet the exigency burden in order to implement its changes, and as a matter of fact by omitting evidence that the Hospital's deadlines were real, and not arbitrary.

To the contrary, there is no legal requirement that external forces control an employer's preexisting annual practice — the only requirement is that the practice be "[an] annually

[183] Tr. 57:16-19; 137:8-13; Jt. Exh. 12.

[184] Provides argument and evidence in support of Exceptions No. 2, 3, and 10-15.

[185] ALJD at 7, n. 3 (concurring with the General Counsel that the exigency exception in *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 82 (1995) is inapplicable to this case).

occurring event," as was stipulated here.[186] In *Stone Container*, the employer had a pre-existing practice of granting annual wage increases every April. On March 23rd, the employer notified the union that economic reasons prohibited it from granting a wage increase in April.[187] Even though the employer provided only a week's notice that it did not intend to increase wages, the Board agreed with the administrative law judge's reasoning that "a full discussion occurred over the April wage increase at the March 23rd meeting [,]" that "the Respondent made its proposal in time for bargaining over the matter if the Union wished to bargain [,]" and that "the Respondent satisfied its bargaining obligation regarding the April 1989 wage increase. …"[188] Nothing in *Stone Container* suggests that external forces required the employer to make wage determinations in April; that was simply its practice.

In this case, the record evidence (unmentioned in the ALJD) shows that the Hospital actually faced meaningful practical restrictions on the timing of the open enrollment process and benefits cycle.[189] But, the only relevant question is whether or not the Hospital, which made its changes pursuant to a pre-existing annual practice, provided the Union with notice and a meaningful opportunity to bargain, which it did. To the extent the Administrative Law Judge required otherwise — including meeting the onerous exigency standard set forth in *RBE Electronics of S.D., Inc.* — it did so in error.

[186] *See Stone Container Corp.*, 313 NLRB 336, 336 (1993); ALJD at 2:26-41, 3:1-4.

[187] *Stone Container Corp.*, supra, 313 NLRB at 336.

[188] *Id* at 337.

[189] Tr. 319:17-23; 320:3-9.

D. The ALJD Erroneously Failed To Address The Fact That The Parties Were Not Required To Reach Single-Issue Impasse.[190]

1. The Parties Were Not Required To Reach Single-Issue Impasse.

Although the ALJD correctly finds that the parties were not required to bargain to overall impasse, it fails to resolve a potentially dispositive issue: whether the parties were required to bargain to impasse over the proposed changes to the health benefits and wellness plans prior to implementation, which they were not. In so doing, the ALJD inadequately addresses the critical facts and legal issues before in dispute, and instead renders a truncated ruling prejudicial to the Hospital. This is especially true given that the Union repeatedly asserted its mistaken belief that the parties were required to bargain to impasse and, in fact, based its entire bargaining strategy around its flawed interpretation of the law, which hindered the bargaining process to the detriment of the Hospital.

Had the ALJD set forth a complete (and legally sound) decision, it would have concluded that, based on the clear intent of the Board, single-issue impasse was not required in this case. In fact, to require single-issue impasse (as the General Counsel and Union urged) wholly undermines the precedent set in *Stone Container* and its progeny.[191] As the Hospital made clear in its post-hearing brief, if, as those cases affirm, an employer is only required to provide notice and a meaningful opportunity to bargain in order to implement changes pursuant to a discrete, pre-existing practice, it is inconsistent — and nonsensical — to also require that the parties reach impasse over that discrete issue. In *Nabors*, for example, the Board affirmed that the employer met its obligation to bargain with the union over healthcare even though there was "no evidence"

[190] Provides argument and evidence in support of Exceptions No. 41-43.

[191] *Stone Container Corp.*, supra, 313 NLRB at 336; *see also St. Mary's*, 346 NLRB 776 (2006); *Nabors*, 341 NLRB 610 (2004); *Saint-Gobain*, 343 NLRB 542 (2004).

that further bargaining between the parties over the employer's proposed healthcare changes "would have been fruitless."[192] In *St. Mary's*, the Board affirmed that although the parties "had exhausted all possibilities of reaching agreement over the healthcare issue before the deadline [,]" implementation of the healthcare plan did not foreclose further bargaining over healthcare and, in fact, the union was at any time permitted to request further bargaining over the issue.[193]

Further, a fully reasoned ALJD would have acknowledged that requiring single-issue impasse is particularly impracticable given that the limited time frame available to the parties to reach agreement over the healthcare related issues does not permit protracted bargaining. Again, the Hospital asserted its position in its post-hearing brief, which the ALJD overlooks completely. In both *St. Mary's* and *Nabors*, time was of the essence, and the parties had a short period of time with a limited number of opportunities to bargain before a decision was to be made. In *St. Mary's*, the parties attended only five bargaining sessions in the two-month window available to them.[194] In *Nabors*, the employer notified the Union of its proposed healthcare changes on December 6th, but the parties failed to schedule *any* bargaining sessions until January 10th — *after* the employer already announced that it would implement its healthcare changes in time for the next calendar year.[195]

Finally, the ALJD fails to recognize, as it should have, that imposing a single-issue impasse requirement in cases such as these would not only be destructive to the prevailing legal standard, it would also encourage never-ending game playing and litigation, as is the case here. Specifically, a single-issue impasse requirement would encourage unions to protract negotiations

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[192] *Nabors*, supra, 341 NLRB 610 at 613.

[193] *St. Mary's*, supra, 346 NLRB 776 at 777 n.4, 781.

[194] *Id.* at 779-81.

[195] *Nabors*, supra, 314 NLRB at 611-12.

and force employers to absorb increased health benefits costs indefinitely. This is not practical, fair, or consistent with *Stone Container* and its offspring. The ALJD's failure to address this was in error and must be reversed.

2. Although Not Required To, The Parties In Fact Reached Impasse.[196]

Not only does the Administrative Law Judge erroneously fail to reach the issue of whether the parties were required to bargain to impasse as to the health benefits and wellness plan, but the Decision compounds this error by declining to address whether impasse had actually been reached. Although the Hospital does not concede that it was required to reach single-issue impasse, the overwhelming evidence, omitted by the ALJD, is that the parties did in fact do so, despite the Union's best efforts to frustrate the bargaining process.

As set forth by the Hospital in its post-hearing brief, the Board has defined impasse as the "point of time in negotiations when the parties are warranted in assuming that further bargaining would be futile."[197] Impasse occurs when "good faith negotiations have exhausted the prospects of concluding an agreement",[198] leading both parties to believe that they are "at the end of their rope."[199] Where the record as a whole demonstrates good faith bargaining, the law permits unyielding positions even if that insistence produces a stalemate.[200] It is well-settled that, thereafter, an employer is free to make unilateral changes in working conditions consistent with its prior offers.[201] Among the factors relevant to an impasse determination are the bargaining

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[196] Provides argument and evidence in support of Exceptions No. 43-44.

[197] *Patrick & Co.*, 248 NLRB 390, 393 (1980).

[198] *Serramonte Oldsmobile, Inc. v. NLRB*, 86 F.3d 227, 232-33 (D.C. Cir. 1996); *Taft Broad. Co.*, 163 NLRB 475, 478 (1967).

[199] *PRC Recording Co.*, 280 NLRB 615, 635 (1986).

[200] *Saint-Gobain*, supra, 343 NLRB at 542.

[201] *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982).

history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issues as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of the negotiations.[202]

Critically, the Board recognizes that "in time-sensitive circumstances, bargaining need not be protracted."[203] In *Saint-Gobain*, time-sensitive changes to health insurance plans were the "most important, and urgent issue."[204] The employer made it clear that it would accept nothing less than implementation of a specific low-cost plan and increased out-of-pocket expenses, and the union made it equally clear that it would accept nothing less than the maintenance of the status quo for employee contribution rates.[205] Each party demonstrated that it was "unwilling to compromise from [its] position[]" which was "proved by the fact that at no time . . ." after the announcement of implementation did the union propose "anything new."[206]

Although the Administrative Law Judge wholly ignored the record as to the issue of impasse, this case mirrors *Saint-Gobain*. Here, the Hospital immediately informed the Union that its health benefits and wellness program proposals were a matter of urgency and were time-sensitive.[207] The Hospital made it clear that maintaining the status quo with regard to the 2012 health benefits plan and wellness program was unacceptable, but the Union made it equally clear that it would accept nothing less. In fact, the Union refused to budge on the wellness program at all, and its "counterproposal" regarding wellness completely rejected the Hospital's proposed

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[202] *Taft Broad. Co.*, supra, 163 NLRB at 478.

[203] *Saint-Gobain*, supra, 343 NLRB at 556 (internal citations and quotation marks omitted).

[204] *Saint-Gobain*, supra, 343 NLRB at 560.

[205] *Id.* at 559.

[206] *Id.* at 560.

[207] Tr. 84:9-12; 122:21-25; 123:1; 214:11-17.

changes.[208] The Union's counterproposal to the benefits plan was similarly unwavering, and its proposal would have required the Hospital to absorb almost all the increased costs that the Hospital had already indicated it was unable to bear.[209] And, the Union's proposal would not become effective until the parties negotiated the entire contract – an event that had no foreseeable future.[210] The Union was only willing to negotiate health benefits on a separate track if the Hospital agreed to freeze all current benefits in place, which was something the Hospital made clear it was unwilling to do.[211] Even after the Hospital announced its intention to proceed with its proposed changes and initiate open enrollment on November 1, 2012, the Union (like the union in *Saint-Gobain*) made no new proposals concerning healthcare.[212] Further, although the parties had, in the span of over a month, attended four bargaining sessions and exchanged numerous fliers and letters, they "were completely stuck on the issues" and were no closer to reaching agreement on the health benefits and wellness plan than they had been when the Hospital first notified the Union of its proposed changes on September 19th and 21st.[213] Clearly, the parties were not in a position to reach agreement on the health benefits or wellness plan for 2013 in advance of the November 1st deadline, and reached impasse in light of the open enrollment period.[214] Had the ALJD applied the correct legal standard and reached the critical questions raised for decision, this would have been the only correct ruling.

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[208] Tr. 122:9-10; 227:1-3; Jt. Exh. 12.

[209] Tr. 227:20-228:3; 229:3-4; 230:17-21; 231:13-21; Jt. Exh. 12.

[210] Tr. 138:19-23; 230:14-17; Jt. Exh. 12.

[211] Tr. 233:18-234: 3; 244:24-245: 3.

[212] Tr. 68:19-22.

[213] Tr. 235:4-13.

[214] As made clear in the Hospital's post-hearing brief, the parties did of course continue to bargain on what language a future *contract* would contain on benefits, as evidenced, for example, by the Hospital's November 14, 2012 proposal. (Jt. Exh. 17.) But there is no evidence

Footnote continued on next page

3. The ALJD Fails, In Error, To Find The Union Bargained In Bad Faith.[215]

Finally, the ALJD dismissed, without basis, the clear evidence that the Union bargained in bad faith and is precluded from challenging the fact that the parties reached single-issue impasse. The Decision's finding that "Respondent cannot be heard to complain about the timing of the Union's counterproposal when it had no real intention of considering it" ignores the clear record evidence of the Union's misconduct and cannot stand.[216] Indeed, the Hospital relied on uncontroverted facts and well-established case law on this point in its post-hearing brief, all of which were erroneously dismissed out of hand in the ALJD.

As the Hospital made clear to the Administrative Law Judge, even if single-issue impasse was legally required (and the Hospital submits, for all the reasons set forth above and in its post-hearing brief, that it was not) any claim that the parties were not at impasse is barred because the Union bargained in bad faith over the proposed health benefits and wellness program changes. Bad faith bargaining precludes a party's ability to challenge impasse.[217] Bad faith actions covered by this defense include activity designed to frustrate productive negotiations. In *NLRB v. Ozanne Construction Co.*, for example, the NLRB General Counsel acknowledged that bad faith bargaining by the union could "suspend the duty to bargain" and "allow[] a company

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that either party made any further proposals on the separate and discrete issue of 2013 benefits. (In a similar vein, it should be noted that the Hospital's implementation of benefits for 2013 was based upon its September 19th and 21st notice letters regarding specific benefit levels for 2013, not its earlier, more open-ended contract proposal regarding benefits. (Jt. Exh. 4A.) In fact, Scanlan's October 26, 2012 letter made it clear that the Hospital would bargain over contract language on the benefits issue. (Jt. Exh. 14.) Again, the ALJD makes no mention of this.

[215] Provides arguments and evidence in support of Exceptions No. 23-26, 30-35, and 43.

[216] ALJD at 8, n. 6.

[217] *See Harmon Auto Glass*, 352 NLRB 152, 153 (2008); *AK Steel Corp.*, 324 NLRB 173, 186 n.34 (1997); *Honda of Hayward*, 314 NLRB 443, 449 (1994); *Chi. Tribune Co.*, 304 NLRB 259 (1991).

unilaterally to implement its last, best offer. …"[218] Even where a union's conduct does not violate its statutory obligation to bargain in good faith, an employer may be permitted to implement changes consistent with its last offer if the union engages in conduct that prevents parties from reaching either agreement or genuine impasse.[219]

Bargaining in good faith requires the parties to engage "in a sincere effort to reach an agreement. …"[220] In evaluating allegations of surface bargaining, the Board looks to "the totality of the circumstances in which the bargaining took place."[221] Conduct supporting a finding of surface bargaining includes delaying tactics and unreasonable bargaining demands.[222] Further, the Board looks to a party's motivation and state of mind to determine whether it aimed "to camouflage an intention to not reach an agreement …" through surface bargaining.[223] These factors "must be considered in unity, not as separate fragments each to be assessed in isolation."[224]

The ALJD wholly disregards relevant evidence showing that the Union did not bargain in good faith, and that the Hospital did. Indeed, the Hospital showed evidence that the Union's bad faith and dilatory tactics were a transparent effort to ensure that negotiations would neither end in agreement nor impasse. The Union believed that it was not required to act with any sort of

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[218] 112 F.3d 219, 223 (6th Cir. 1997).

[219] *See* 1 John E. Higgins, Jr., DEVELOPING LABOR LAW 1058 (6th ed. 2012); *see also Jefferson Smurfit Co.*, 311 NLRB 41, 60 (1993) (finding that, in the absence of legally cognizable impasse, the employer was permitted to unilaterally implement its last-proposed contract because the union engaged in conduct that prevented the parties from reaching agreement or genuine impasse, even absent a finding that the union engaged in an unfair labor practice).

[220] *Bedford Farmers Coop.*, 259 NLRB 1226, 1237 (1982).

[221] *United Techs. Corp.*, 296 NLRB 571, 572 (1982) (internal citations omitted).

[222] *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984).

[223] *Bedford Farmers Coop.*, supra, 259 NLRB at 1237.

[224] *Id.* at 1238.

urgency, and so it did not. Even though the Hospital repeatedly informed the Union otherwise, the Union issued repeated communications to its members claiming that the Hospital was not permitted to effect changes to the health benefits and wellness program absent agreement from the Union.[225] The Union, however, stuck to its theory, bided its time, and hoped to run the clock. For example, the ALJD (while making much of the Hospital's subsequent communication to employees) omits to mention that the Union disseminated written materials to its members on October 2, 2012, claiming that "Sutter Tracy must continue to offer all benefits without change until we have reached agreement for any changes."[226] The Union's flier asserted that "the 2012 wellness program must be continued as it is today" but it made no mention of the health benefits, or any of the details of the proposed changes to either program.[227] Although the Union's representative repeatedly said that the Union was "still sorting through things" and soliciting feedback from its members, the Union failed to actually commit its request for feedback to writing until October19th, nearly a month after the Hospital notified the Union of its proposed changes.[228] Tellingly, although the Union allegedly perceived the Hospital's open enrollment deadline to be unreasonable, at no point did the Union actually request to delay open enrollment so that it could have more time to submit a counterproposal.[229] Nor did the Union bargain, or request to bargain, health benefits or the wellness program during any of the four scheduled bargaining sessions; request to extend any of the bargaining sessions to address these issues; or,

[225] Tr. 122:8-10, 15-24; 113:6-14; 114:4-8; 118:13-14; 122:17-20; 124:1-3; Jt. Exh. 8; Er. Exh. 5.
[226] Er. Exh. 5.
[227] Tr. 119:3-7, 11-17; Er. Exh. 5.
[228] Tr. 53:13-16; 123:13-16; Er. Exh. 7.
[229] Tr. 134:1-2, 6-8.

request to schedule any additional sessions in advance of the open enrollment deadline.[230] Instead, the Union waited until October 25th, over a month after it learned of the proposed changes and only six days before open enrollment was to begin pursuant to past practice, to submit a counterproposal to the Hospital.[231] This proposal, of course, made no movement whatsoever on the wellness program, and made unreasonable demands regarding the health benefits, *i.e.*, to freeze them until the parties could agree to an overall contract.[232] In other words, the Union doubled down on its position that it would seek to hold the plan changes hostage to its overall bargaining agenda.

The ALJD's mistakenly ignores this evidence. Had it considered the evidence, the only reasonable conclusion the Decision could have reached is that the Union's laissez-faire conduct in the face of time-sensitive deadlines was designed to frustrate the achievement of either an agreement or impasse. The Union, therefore, should not be heard to claim that the Hospital made a unilateral change based on an alleged lack of impasse. This is true regardless of whether the Union engaged in unlawful conduct. Certainly, as the Hospital set forth both above and in its post-hearing brief, impasse was not required under the circumstances for the Hospital to lawfully implement changes to its health benefits and wellness program. But, assuming *arguendo*, that the impasse was necessary and that the Union succeeded in thwarting it, the Union's own bad faith precludes it from challenging the Hospital's implementation of its proposed changes to the health benefit and wellness program. The ALJD circumvented this issue in error.

[230] Tr. 42:6-9; 107:12-21; 109:7-13; 189:17-190:5.

[231] Tr. 57:16-19; 137:8-13; Jt. Exh. 12.

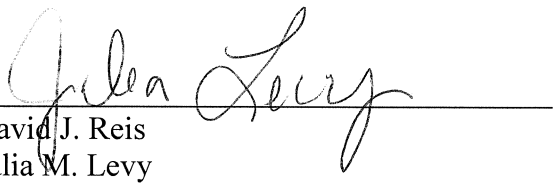
[232] Tr. 233:18-234:3; 244:24-245:3.

IV. CONCLUSION

For each and all of the foregoing reasons the Hospital requests that the Administrative Law Judge's Decision and Recommended Order be reversed and the Complaint be dismissed in its entirety.

Dated: April 24, 2014

Respectfully submitted,



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